

An Rialálaí
Carthanas

Charities
Regulator

Review of registered charities holding shares in section 110 companies on trust

April 2017

The Charities Regulator, in accordance with the provisions of section 14 of the Charities Act 2009, carried out a review of registered charities holding shares in section 110 companies on trust.

1. Purpose and scope of the review

- 1.1 On 2 September 2016, the Charities Regulator commenced a review of charities on its public Register of Charities (the Register) for the purpose of establishing the number of registered Irish charities holding shares in special purpose vehicles (SPVs) / section 110 companies on trust and to determine whether they fell within the remit of the Charities Act 2009 (the Act).
- 1.2 While the Charities Regulator is cognisant of the wider public interest in varying aspects of the operation of the financial services sector in Ireland, including those aspects taxed pursuant to section 110 of the Taxes Consolidation Act 1997, the scope of this review solely covers the extent to which registered charities hold shares in section 110 companies. The review does not extend to, or purport to make conclusions regarding general investment decisions and asset holdings of charitable organisations.
- 1.3 As the purpose and scope of the review is thematic in nature, the review does not make findings or draw conclusions in respect of particular organisations. For this reason, individual organisations are not identified.

2. How organisations become registered charities

- 2.1 There are two distinct methods by which an organisation can become a registered charity within the meaning of the Act (see Figure 1 below).

Figure 1 - Methods of Registration

Method A:

Section 40 Charities: Automatically registered charities

Section 40 of the Charities Act 2009 provides automatic registration for those organisations which, as of 16 October 2014, held a valid charitable tax exemption (CHY number) issued by the Revenue Commissioners. Such charities are deemed registered with the Charities Regulator so long as they are entitled to hold this charitable tax exemption. On 16 October 2014, 8,452 charities were automatically registered.

Method B:

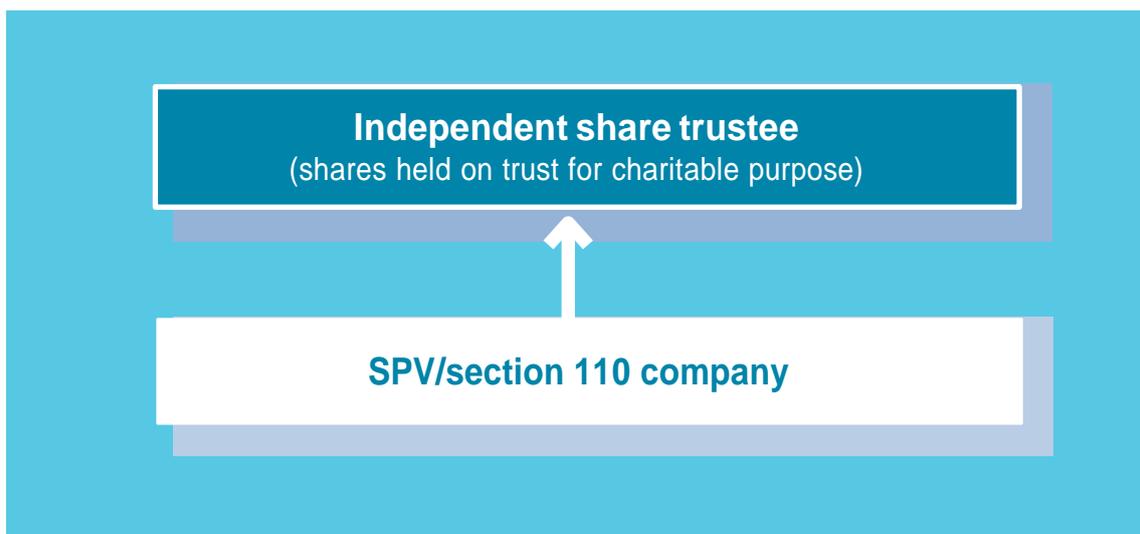
Section 39 Charities: Organisations apply to the Charities Regulator to become registered charities

Section 39 of the Charities Act 2009 sets out the information required of charitable organisations when applying for charitable status. Charitable organisations established before 16 October 2014 (pre-established) which did not have a charitable tax exemption (CHY number) and charitable organisations established after that date must apply for inclusion on the Register regardless of size, legal structure or income.

3. Section 110 companies using orphan company structures

- 3.1 Figure 2 below, shows a section 110 company in an orphan company structure. There are a number of reasons why a section 110 company might be established as an orphan company. One of those reasons is to provide 'bankruptcy remoteness'. This is where a section 110 company is used to isolate the financial risk from the sponsor entity¹ in the event of bankruptcy or default. The section 110 company is set up to operate as a distinct legal entity and cannot be brought into insolvency proceedings relating to another person.

Figure 2 - Example of a section 110 company in an orphan company structure



- 3.2 In order to create bankruptcy remoteness, the section 110 company is set up using an orphan company structure whereby the shares of the company are held on trust by an independent share trustee. It should be noted that the independent share trustee could have multiple section 110 shareholdings.
- 3.3 The share trustee will be the registered owner of the share capital and will declare a trust over it. Where the share trustee is a charitable organisation, it will declare that it holds any benefit it receives from the share capital for the benefit of charitable purposes.
- 3.4 Any proceeds that arise to the share trustee with respect to the share capital are donated to the charitable purpose in accordance with the declaration of trust.
- 3.5 There is no difference in the tax treatment of a section 110 company where the shares are held by a registered charity because the tax treatment of the section 110 company is specifically provided for by the relevant tax legislation. The charitable status of its shareholders does not give rise to any tax benefit to the company from the use of such corporate structures.

¹ The sponsor is the entity on whose behalf the section 110 company is established.

4. Section 8 of the Charities Act 2009

- 4.1 A key aspect of this review is section 8 of the Act. Section 8 (see Figure 3 below) sets out specific criteria that, if met, result in certain trusts ('section 8 trusts') being exempt from the Act.

Figure 3 - Section 8 of the Charities Act 2009

- 8.** - *The Act shall not apply to a trust the only property of which consists of –*
- a) *shares in a qualifying company established for the purposes of section 110 of the Taxes Consolidation Act 1997,*
 - b) *shares in a company whose business consists solely of the leasing of plant and machinery,*
 - c) *dividends paid in respect of such shares, being dividends that are not retained as part of the property of the trust for more than 12 months, or*
 - d) *any other distribution of cash or assets made in respect of such shares, being cash or assets that are not retained as part of the property of the trust for more than 12 months.*

5. Findings

Number of registered charities holding shares in section 110 companies on trust

- 5.1 While it is difficult to establish the number of registered charities holding shares in section 110 companies, the review, based on media reports and engagement with the Revenue Commissioners (Revenue) and the Irish Debt Securities Association, identified four registered charities holding shares in section 110 companies on trust.
- 5.2 The registered charities identified were 'automatically registered charities' (see Figure 1, Method A).

Details and nature of registered charities' shareholdings in section 110 companies

- 5.3 The review found that, of the registered charities identified, only one held assets in companies whose business solely consists of the leasing of plant and machinery, and that the organisation made donations in respect of all dividends received on these shares within the last 12 months to benefit its charitable purpose. Accordingly, the Charities Regulator deemed that the organisation fell within 'section 8' and as such, was exempt from the provisions of the Act. A trust that comes within section 8 of the Act cannot be deemed to be a registered charity under section 40 of the Act. Accordingly, the Charities Regulator de-registered the trust concerned from the Register. The trust remains on Revenue's list of bodies who currently hold charitable a tax exemption.²
- 5.4 During the course of the review, the Charities Regulator engaged with the remaining three charities identified. The Charities Regulator raised concerns with them in respect of their shareholdings, specifically whether they were meeting the definition of a charitable organisation i.e. that the organisations had a charitable purpose only.
- 5.5 The responses received from the charities concerned, included the following points:
- Both in the Act itself and in other charity legislation, a clear distinction is drawn between the purpose of a charitable organisation and its activities.
 - The activities of the charities in holding shares in companies and raising funds by doing so are clearly ancillary to and further the charitable purpose.
 - The types of activities that charities can engage in to raise money can vary considerably from charity to charity and can range from running bake sales to holding poker classics or race nights. The fact that the charities engage in the activity of holding shares in companies does not alter their essential charitable purpose.
 - The activity of holding shares does in fact further the charitable purpose of the charities, in that any funds received are applied to charitable purposes and can only be applied for such purpose.
- 5.6 Notwithstanding the organisations' views of their entitlement to continue as charities, the organisations cited external policy uncertainties in this area, such that they were unclear as to the future status of the charities. Subsequently they changed their structures from charities to trust services providers and accordingly Revenue, based on the change of structure of the trusts, withdrew the charitable tax exemptions granted to the bodies. Following Revenue's removal of their charitable tax exemption, the Charities Regulator de-registered the organisations from the Register.

² List of bodies who have been granted charitable tax exemption under section 207, Taxes Consolidation Act, 1997. www.revenue.ie/en/about/publications/charities_alpha.pdf

Charities Regulator's view on registered charities holding shares in section 110 companies on trust

- 5.7 While the Charities Regulator recognises the legal distinction between a charity's charitable purpose (as set out in its governing document) and the activities it conducts, the review examined the substance of the operations of the charities. The review noted the following:
- Some of the charities held multiple shareholdings in various section 110 companies. The volume of the shareholdings brings into question the 'ancillary nature' of this activity.
 - It appeared that the activities of the charities solely consisted of holding shares in section 110 companies and the distribution of the income derived from them to other charitable organisations.
 - Contrary to the stated views of the charities that the holding of shares was an ancillary activity, a review of correspondence from the charities to Revenue³ suggests that in some cases, the holding of shares in section 110 companies was the actual purpose of establishing the entities.
- 5.8 The Charities Regulator is not convinced by the arguments put forward by the entities concerned that their activities insofar as they consist of holding shares in section 110 companies are merely ancillary to their purpose.
- 5.9 The Charities Regulator understands that, historically, for reasons including the absence of alternative suitable legal structures and to provide bankruptcy remoteness, a practice emerged of using trusts, in the form of charities, to hold shares in section 110 companies.
- 5.10 The Charities Regulator recognises that registered charities can make investments and hold shares⁴ in order to achieve a return so that they can further their charity's aims. However, it is the view of the Charities Regulator that the holding of shares in itself should not be the motivation and reason for a charity's existence.
- 5.11 Prospective organisations seeking to obtain charitable status and those currently on the Register should be mindful that in order to qualify for and maintain charitable status the organisation must have exclusively charitable purposes.

³ The Charities Regulator issued a request to Revenue for information in respect of the charities pursuant to Section 40(2) of the Act.

⁴ Any investments entered into by charity trustees should be within their legal powers.

6. Conclusions

- 6.1 The Charities Regulator identified four registered charities holding shares in section 110 companies on trust. All of the charities were automatically deemed registered charities as they held Revenue charitable tax exemption status prior to the commencement of the Charities Act 2009.
- 6.2 One organisation was, due to the nature of their property holding, identified as being a trust to which section 8 of the Act applied. The Act does not apply to a trust that falls within the scope of section 8 of the Act and so is not capable of registration. Therefore, the Charities Regulator de-registered the organisation from the public Register of Charities.
- 6.3 The remaining three registered charities that were identified as holding shares in section 110 companies changed their structures from charities to trust services providers. Accordingly, Revenue withdrew their charitable tax exemption and the Charities Regulator de-registered the organisations from the public Register of Charities.
- 6.4 The Charities Regulator is currently not aware of any other register charities in Ireland holding shares in section 110 companies on trust.
- 6.5 The Charities Regulator recognises that registered charities can make investments and hold shares in order to achieve a return so that they can further their charity's aims. However, it is the view of the Charities Regulator that the holding of shares in itself should not be the motivation and reason for a charity's existence.
- 6.6 Prospective organisations seeking to obtain charitable status and those currently on the Register should be mindful that in order to qualify for and maintain charitable status the organisation must have exclusively charitable purposes.

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